06-2439
Yong Fu Lin v. USDOJ

A97 976 673
BIA
Bukszpan, IJ

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO SUMMARY ORDERS FILED AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY THIS COURT'S LOCAL RULE 0.23 AND FEDERAL RULE OF APPELLATE PROCEDURE 32.1. IN A BRIEF OR OTHER PAPER IN WHICH A LITIGANT CITES A SUMMARY ORDER, IN EACH PARAGRAPH IN WHICH A CITATION APPEARS, AT LEAST ONE CITATION MUST EITHER BE TO THE FEDERAL APPENDIX OR BE ACCOMPANIED BY THE NOTATION: "(SUMMARY ORDER)." UNLESS THE SUMMARY ORDER IS AVAILABLE IN AN ELECTRONIC DATABASE WHICH IS PUBLICLY ACCESSIBLE WITHOUT PAYMENT OF FEE (SUCH AS THE DATABASE AVAILABLE AT HTTP://WWW.CA2.USCOURTS.GOV/), THE PARTY CITING THE SUMMARY ORDER MUST FILE AND SERVE A COPY OF THAT SUMMARY ORDER TOGETHER WITH THE PAPER IN WHICH THE SUMMARY ORDER IS CITED. IF NO COPY IS SERVED BY REASON OF THE AVAILABILITY OF THE ORDER ON SUCH A DATABASE, THE CITATION MUST INCLUDE REFERENCE TO THAT DATABASE AND THE DOCKET NUMBER OF THE CASE IN WHICH THE ORDER WAS ENTERED.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York on the 7th day of August, two thousand and seven.

Present:

HON. RALPH K. WINTER,
HON. SONIA SOTOMAYOR,
HON. PETER W. HALL,
Circuit Judges.

Yong Fu Lin,
Petitioner,

v. 06-2439-ag

United States Department of Justice,
Attorney General Alberto R. Gonzales,
Respondent.

For Petitioner: RICHARD TARZIA, Law Office of Gregory Marotta, Belle Mead, New Jersey.

For Respondent: THOMAS H. DUPREE, JR., United States Department of Justice, Civil Division, Washington, D.C. (Christopher J. Christie, United States

Attorney for the District of New Jersey; Susan Steele, Assistant United States Attorney, Newark, New Jersey, *on the brief*).

UPON DUE CONSIDERATION, it is hereby ORDERED, ADJUDGED, AND DECREED, that the petition for review of the decision of the Board of Immigration Appeals ("BIA") be and hereby is DENIED.

Petitioner Yong Fu Lin, a citizen of the People's Republic of China, petitions for review of the May 4, 2006 BIA order affirming the December 8, 2004 decision of Immigration Judge ("IJ") Joanna Miller Bukszpan denying his application for asylum and withholding of removal. *In re Yong Fu Lin*, No. A 97 976 673 (B.I.A. May 4, 2006), *aff'g* No. A 97 976 673 (Immig. Ct. N.Y. City Dec. 8, 2004). We assume the parties' familiarity with the underlying facts and procedural history of the case.

When the BIA adopts the decision of the IJ and supplements the IJ's decision, this Court reviews the decision of the IJ as supplemented by the BIA. *See Bhanot v. Chertoff*, 474 F.3d 71, 72 (2d Cir. 2007). This Court reviews the agency's factual findings under the substantial evidence standard. *See* 8 U.S.C. § 1252(b)(4)(B); *Secaida-Rosales v. INS*, 331 F.3d 297, 306-07 (2d Cir. 2003).

Lin claims that the IJ erred in pretermitting his asylum application because the agency read a documentary corroboration requirement into 8 U.S.C. § 1158(a)(2)(D), thereby placing a higher burden on him to establish that the filing of his asylum application was timely. However, we need not reach this claim because Lin is not eligible for either asylum or withholding of removal for past persecution as the spouse of someone forcibly sterilized.[1] We are bound by our recent *en banc* decision in *Shi Liang Lin v. U.S. Dep't of Justice*, --- F.3d ---, 2007 WL 2032066

[1]Title 8, Section 1158(a)(3) of the United States Code provides that no court shall have jurisdiction to review the agency's finding that an asylum application was untimely under 8 U.S.C. § 1158(a)(2)(B), or its finding of neither changed nor extraordinary circumstances excusing the untimeliness under 8 U.S.C. § 1158(a)(2)(D). However, as Lin's jurisdictional issues are complex and his claim is plainly without merit, we assert hypothetical jurisdiction. *See Abimbola v. Ashcroft*, 378 F.3d 173, 180 (2d Cir 2004) (asserting hypothetical jurisdiction where, as here, the jurisdictional issues related to statutory and not constitutional jurisdiction); *see also Ivanishvili v. U.S. Dep't of Justice*, 433 F.3d 332, 338 n.2 (2d Cir 2006) ("Our assumption of jurisdiction to consider first the merits is not barred where the jurisdictional constraints are imposed by statute, not the Constitution, and where the jurisdictional issues are complex and the substance of the claim is, as here, plainly without merit.").

(2d Cir. July 16, 2007) (en banc), which held that an individual, like Lin,[2] whose spouse has been forced to undergo involuntary sterilization does not automatically qualify for asylum as a refugee under § 601(a) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA") (amending 8 U.S.C. § 1101(a)(42), Immigration and Nationality Act ("INA") § 101(a)(42)).[3] Because Lin's application was based solely on his wife's forced sterilization, and not on any "other resistance to a coercive population control program, " 8 U.S.C. § 1101(a)(42)(B), Lin has not, as a matter of law, established past persecution under *Shi Liang Lin* and is thus not eligible for asylum or withholding of removal. Accordingly, we need not review the IJ's finding that petitioner failed to meet his burden of proof to establish eligibility for relief. For the reasons above, the petition for review is DENIED.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk
By:

_____
Oliva M. George, Deputy Clerk

[2]Though Lin and his wife were allegedly married in a traditional ceremony in 1984, the couple did not register their marriage until1990, after the wife's sterilization. Regardless, as *Shi Liang Lin*, 2007 WL 2032066, explicitly applies to both traditional and legal marriages, Yong Fu Lin's application is foreclosed. *Id.* at *13.

[3]Judge Sotomayor continues to disagree with the majority opinion in *Shi Liang Lin* to the extent it applies beyond unmarried partners, *see Shi Liang Lin*, 2007 WL 2032066, at *30 (Sotomayor, J., concurring), but she is bound by court precedent. *See United States. v. Wilkerson*, 361 F.3d 717, 732 (2d Cir. 2004).